FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
JAN 13 1906
JAMES H. McKENNEY,
Clerk.

No. 184.

THE TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY, DEFENDANT IN ERROR.

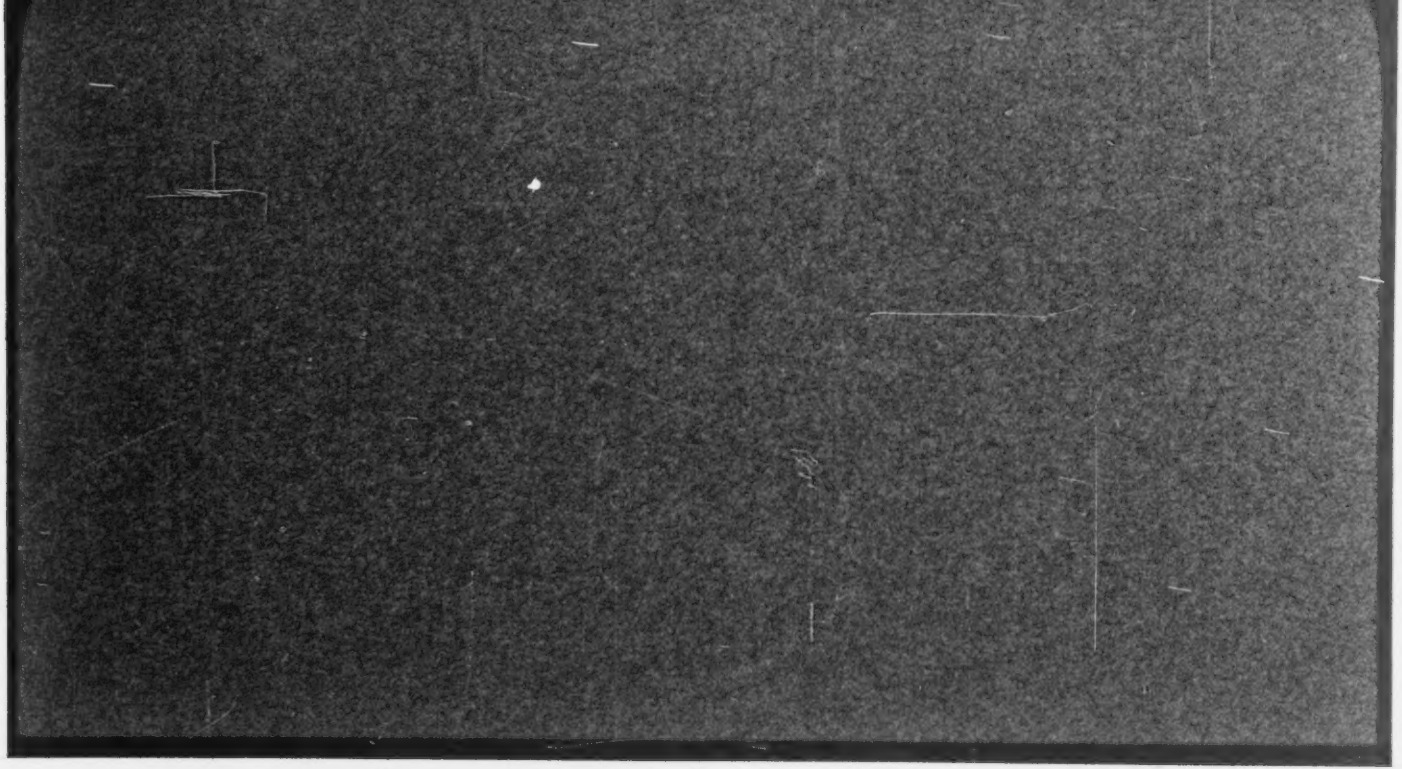
IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Reply Brief for Plaintiff in Error.

JOHN G. JOHNSON,
WM. BRO. SMITH,
EDMUND F. TRABUE,
Counsel.

JOHN C. DOOLAN,
ATTILLA COX, JR.,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 19835



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 184.

THE TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Reply Brief for Plaintiff in Error.

Our original brief anticipated most, if not all, of our learned opponents' points, but a categorical reply to them will present most directly the pivotal issues between us. His points condensed are by him thus stated :

That "the foreign company may of course take its case into the Federal court. That is its constitutional right" (*page 4*), but "is it contrary to the Constitution and the laws of the United States that one who is entitled thereunder to remove a case to the Federal courts is left free to do so, but in the event he does remove he must forfeit a privilege held at the will of the State?" (*page 13*).

In support of their position counsel admit (*page 11*) "repug-"nancy (between Federal Constitution and State statutes) "does exist whenever the State requires the company to "agree in advance not to remove—such an agreement "is void and is so treated in all the cases. In the present "law there is no repugnancy because there is no agree-"ment—no stipulation—for a surrender of any right." (See also *page 15*.)

They define their position to be that if the statute requiring the license make its issuance depend upon a "*stipulation*" not to remove cases to the Federal court the *statute* is void (*page 24*), "and this because the parts of it which might "have been upheld as valid and lawful were so interwoven "with the unconstitutional requirement of a void stipulation "as to make the whole bad" (the Iowa statute involved wherein, by the way, provides for no "agreement" or "stipulation"), *citing Barron vs. Burnside* (*page 25*).

That, *e converso*, however, if the statute requiring the permit impose both *objectionable and unobjectionable* requirements, "but not so 'coupled' as to be inseparable" the statutory requirement of the license would be valid.

The vice of our opponents' argument is that they claim for the State the power to prevent by a general law the exercise for the future of a right which they admit is the "constitutional right" of the company under the Federal Constitution.

The admission that the requirement of the "agreement" or "stipulation" as a condition of the issuance of the license renders the statute invalid is fatal to counsel's entire contention, for an "agreement" or a "stipulation" to surrender a "constitutional right" can no more contravene the constitution than the actual surrender of the right. It is the right of removal to the Federal courts that the Constitution secures, and therefore it is the enforced surrender of the right and not any particular form of surrender that constitutes an

infringement of the Constitution and an illegal condition of a statutory requirement of a license."

Nor does the fact that the "agreement" or "stipulation" to surrender the right of removal is required to be made *in advance*, as contended by opponents, distinguish the Iowa case—or the case admitted by our opponents to infringe the Federal Constitution—from the Kentucky or instant case, for the Kentucky statute likewise *in advance* requires the insurance commissioner *to enforce the abandonment of such right of removal as long as the company remains in the State.* The right of removal could only exist while the company did business in the State, and the statute forbids the exercise of this "constitutional right" during every moment of that time. In each case the legislation provides *in advance* for destruction of the right guaranteed by the Federal Constitution and for the same period of time—*i. e.*, during the corporation's sojourn in the State.

The circumstance that the "agreement" or "stipulation" is required in one case and not in the other constitutes only a formal or nominal distinction between the cases, for it is admitted that the "*agreement*" *or* "*stipulation*" *is void, and could not prevent the removal.* In each case, therefore, the right of removal remains really unimpaired, but in each the statute provides as effectually as possible for destruction of the "constitutional right."

Nor is there any force in the suggestion that the "agreement" or "stipulation" to surrender the "constitutional right" is in one case so interwoven with the provision for license as to invalidate the entire statute, and in the other not, for the right to the license is made as dependent upon the surrender of the "constitutional right" in the latter case as upon the "agreement" or "stipulation" to surrender it in the former. The difference is in form only, and the apparent or seeming separation of the provisions for the grant of license and for the cancellation of the license in case of the removal in the Kentucky statute is purely delusive, and

contrived solely to suppress the real purpose or effect of the enactment. The material and crucial consideration is that in each case, *by provision in advance*, the company is compelled to abandon the right which the Constitution guarantees. The suggestion that the company retains the right of removal is fallacious. The right appertains only to a non-resident, only exists as incident to the non-resident company's sojourn in the State, and if it must forego the right as long as it remains, then the right is completely abandoned, whether there exist the "agreement" or "stipulation" to abandon it or not. The result, therefore, of our opponents' doctrine (*as said in our original brief, pages 8, 9*) is that some of the corporations within the State, and all individuals, would have the protection of the Federal Constitution, while others would be permitted to remain only upon condition of foregoing that protection and being subject to the exercise of arbitrary power. If the State may require the foreign corporation, *during its sojourn in the State*, to forego one guaranty of the Federal Constitution, it may equally require it to forego all, and thus there would be within the State certain corporations destitute of the protection of the Federal Constitution while others enjoyed it. It is not true, as our opponents contend, that the right of removal would remain unimpaired and only the right to transact business be impaired, for the period of the abandonment of the right of removal is by the statute made coexistent with the period of the company's sojourn in the State.

The anomaly, therefore, of some corporations with and some corporations without the protection of the Federal Constitution would, as aforesaid, exist in the State. The surrender or abandonment of the "constitutional right" of removal to the Federal courts would consequently as certainly exist as if the legislature had confessed instead of attempting to suppress the fact in the statute. The situation on the Kentucky statute, therefore, is not distinguish-

able on the constitutional objection from that on the Iowa statute noted in *Barron vs. Burnside*, albeit there was a "stipulation" for the surrender of the right of removal in the one and not in the other case.

It thus appears that the *instant case* would not be distinguishable from *Barron vs. Burnside* even if the Iowa statute required a stipulation, but in reality it requires none, nor does the Texas statute.

Accordingly we submit that *Barron vs. Burnside* (*121 U. S., 186*) and *Sou. Pac. Co. vs. Denton* (*146 U. S., 202*) are conclusive in favor of our claim "that the entire purpose of" the Kentucky statute "is to deprive the foreign corporation' * * * "of the right conferred upon it by the Constitu- "tion and laws of the United States to remove a suit from "the State court into the Federal court," &c., (*121 U. S., 197*), and that the statute essentially "makes the right to a per- "mit dependent upon the surrender by the foreign corpora- "tion of a privilege secured to it by the Constitution and "laws of the United States," and is unconstitutional (*121 U. S., 200*); and is a "vain attempt to prevent removals into "the national courts" (*146 U. S., 207*).

JOHN G. JOHNSON,
WM. BRO. SMITH,
EDMUND F. TRABUE,
Counsel.

JOHN C. DOOLAN,
ATTILLA COX, JR.,
Of Counsel.

RECEIVED
APR 4 1906
SUPREME COURT U. S.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 184.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, - - *Plaintiff in Error,*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY.

MOTION.

The Traverers Insurance Company, plaintiff in error, says that the authority to transact business in Kentucky which was granted to it by the Insurance Commissioner, July 1, A. D., 1904, as appears in the record, was not permitted to expire as assumed in this court's opinion herein, but that Henry R. Prewitt, Insurance Commissioner, aforesaid, in order to avoid the unnecessary loss to plaintiff in error, and the destruction of its business *pendente lite* renewed the said authority July 1, 1905, for the term of one year next ensuing, subject to his right to cancel, [illegible] with the understanding that he would cancel such authority immediately upon this court's decision in his favor of the Federal Question raised in this record, if decided in his favor; accordingly, and to manifest in this court the facts aforesaid, plaintiff in error moves the court for leave to file the affidavit of its counsel, Edmund F. Trabue, and the letter written to said Trabue by said Prewitt, March 12, 1906.

JOHN G. JOHNSON,
EDMUND F. TRABUE,
Counsel.

Notice that the above entitled motion will be made April 2, A. D., 1906, is hereby accepted.

HENRY R. PREWITT,
Insurance Commissioner,
by J. H. HAZELRIGG,
Counsel.

RECEIVED
1906

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 184.

THE TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT, - - *Plaintiff in Error.*

v.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY.

AFFIDAVIT.

Edmund F. Trabue says that he is and has been since the inception of this suit counsel for plaintiff in error, and that on or before July 1, 1905, defendant in error renewed for one year next ensuing the authority of said plaintiff to transact business in Kentucky, upon the understanding, as affiant has always understood, that such renewal was without prejudice to said defendant's right to cancel said authority, should this court decide in defendant's favor the Federal Question of the constitutionality of Section 631, Kentucky Statutes. That said act of said defendant was done to avoid the loss that might very unjustly accrue to said plaintiff if unlawfully deprived of its authority to transact business, should Section 631 Kentucky Statutes be afterward held unconstitutional.

Affiant attaches hereto the authority issued as aforesaid, July 1, 1905, and a manuscript letter written to him

by defendant, Prewitt, on the 12th day of March, 1906, responsive to a letter affiant wrote Prewitt, in words and figures as follows:

March 9, 1906.

TRAVELERS' INS. CO. V. PREWITT.
Henry R. Prewitt, Esq.,
Insurance Commissioner,
Frankfort, Ky.

Dear Sir:

When the Travelers' license was renewed July 1, 1905, I am advised that some *memo.* was made of record probably to the effect that it was without prejudice to the rights of the Commissioner to cancel the license in case of a decision in his favor by the Supreme Court. Please advise me what was done and if there be any record send me a copy of it with *memo.* of costs of copy, and much oblige.

Hoping to see you soon, I am,

Yours very truly,

T. Y. EDMUND F. TRABUE.

Affiant says the foregoing statements are true to the best of his knowledge and belief.

EDMUND F. TRABUE.

Subscribed and sworn to before me by Edmund F. Trabue this 31st day of March, 1906. My commission expires February 15, 1908.

V. C. YEAGER,
Notary Public, Jefferson County, Kentucky.